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No. 92-771

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE HASENFUS and KASANEE SAWYER,
Petitioners,

v.

RICHARD SECORD and SOUTHERN AIR TRANSPORT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT RICHARD SECORD

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QUESTION PRESENTED

Whether the Petition presents error properly reviewable by this Court?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioners Eugene Hasenfus and Kasanee Sawyer and the Respondents Richard Secord and Southern Air Transport. Three other parties named in the complaints, Plaintiff Sally Hasenfus and Defendants Corporate Air Services and Albert Hakim, are not involved in this petition for certiorari.

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BRIEF IN OPPOSITION OF RESPONDENT RICHARD SECORD

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 962 F.2d 1556.

JURISDICTION

The jurisdiction of this Court to review the opinion of the Eleventh Circuit was invoked under 28 U.S.C. § 1254(1). Respondent Secord contends that this Court has no jurisdiction since the Petition was not timely filed by a then member of the Bar of this Court. (See Brief of Respondent Southern Air Transport).

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises out of the participation of Eugene Hasenfus and Wallace B. Sawyer, Jr., and others in an airlift operation engaged in the delivery of weapons and supplies to the Nicaraguan "Contras" (combatants in a civil war in Nicaragua) in 1986. During one of these airlifts, on October 5, 1986, an aircraft which Mr. Sawyer was flying and on which Mr. Hasenfus was working, was shot down over Nicaragua by a Sandinista surface-to-air missile. Mr. Sawyer, along with two others, was killed. Mr. Hasenfus was able to parachute from the aircraft before it crashed and was later captured, tried and (three months later) released by Nicaraguan forces. Petitioner Kasanee Sawyer is the administratrix of the Estate of Wallace B. Sawyer.

B. The Facts.

In 1985 the White House, together with Central Intelligence Agency Director, William Casey, developed the concept of a "bridging operation" during a period of Congressional ban of CIA aid to the Nicaraguan "Contras." The CIA was prepared to resume its covert role after the ban was repealed. Retired Air Force General Richard Secord, then a private citizen, had been initially recruited to supervise an operation known as the "Iran Initiative." In the summer of 1985, he was also requested to organize the Nicaraguan Resistance air supply operation until the CIA could take it over. This "takeover", which was expected imminently, ultimately stretched out for over nine months.

Secord recruited Richard Gadd, with whom he had previously worked, to develop an air resupply operation. Gadd met with, and proposed a plan to Secord, White House officials and the Central Intelligence Agency. Gadd then recruited Edward Garay, who owned a company

known as Corporate Air Services. All the pilots, maintenance personnel and supply specialists including Eugene Hasenfus were seasoned combat veterans with great experience in military operations. All were private citizens. Southern Air Transport, Inc., a Miami-based company, was utilized by contract for some repair and maintenance procedures on aircraft purchased by the private resupply group.

Wallace B. Sawyer and Eugene Hasenfus were hired by Corporate Air Services as independent contractors. They both signed written contracts. Sawyer was an experienced combat pilot and Eugene Hasenfus was an experienced combat supply drop specialist ("kicker"). They were stationed in a Contra air base at Ilopango, El Salvador. During the early days of October, 1986, a mission was planned to drop military supplies to the Southern Front inside Nicaragua near the Costa Rican border.

The mission planned for October 5, 1986, was a dangerous one. During planning sessions with the Contra military leader, Colonel Enrique Bermudez, the flight plan and drop zone targeted in Southern Nicaragua were carefully discussed by the crew, including the pilot William Cooper. U.S. Military advisors provided the pilots with intelligence and satellite information. On October 5, 1986, with the plane functioning perfectly, the mission began.

The events are best described by the sole survivor Petitioner, Hasenfus:

> A It was just about 12:40. The reason why I can state this very clearly, because I'll never forget it, is: We were flying on our northwestern approach into our target. I was in the back of the aircraft, standing in this open door, the door that was taken off, I was standing, hanging onto part of the structural part of the aircraft; and I was also observing where we were at. In other words, I was looking out. Any main ter-

rain features, I would talk with Buzz Sawyer over the intercom; and he would double-check it on his map. Buzz Sawyer at the same time was checking his Omega; and he was also checking his Loran, which was giving him—us time and distance from our target.

Q Did you gain an impression as to what type of man Buzz Sawyer was when you were down in Nicaragua?

A Yes, I did. Buzz Sawyer was a pilot's pilot. He was an individual that everybody looked up to and respected.

Q As you were flying over the jungle at about noon, can you describe what happened.

A Yes. As we were coming into our—on our northwest heading coming into our coordinates, our Loran was locked in. We were coming in. He was—Buzz Sawyer was reading out the time and distance to the target, because I remember very vividly him saying, "Well, we're about four minutes out. We're about three minutes out."

And everything was coordinated. Our map that he was looking at in his lap and also when I was looking out the door, seeing this river was here coming in between these points, verified everything. At the same exact time, the Nicaraguan freedom fighter that was on board was in communications with this FDN team that was on the ground and needed support; and he had direct communications and was talking with them.

Q And then what happened?

A Well, I remember, because he said, "We're just"—I looked at my watch, and it was 12:40 exactly. And it was just, oh, a matter of seconds after that. There was a loud explosion form the right. I was astonished. I looked. The whole aircraft was on fire. Buzz Sawyer came over the intercom, and his last words to me was "What happened?" I said, "Oh we took a hit," and that's the last words I said.

The aircraft had been shot down by a surface-to-air missile, fired from the jungle floor as the plane flew over.

Wallace B. Sawyer, William Cooper and the Contra military advisor on board were killed. Hasenfus was captured and charged with terrorism, violation of Nicaraguan air space and other similar crimes by the Nicaraguan government. He was tried and convicted. Three months later he was released. He was assisted without charge by various persons, including U.S. Senator Chris Dodd, former Attorney General Griffin Bell, and others.

Petitioners first filed suit in a California State Court, and then in the Federal District Court for the District of Columbia seeking many millions of dollars in damages based upon various theories of negligence, emotional distress, and breach of contract. Those suits were dismissed. This suit, based upon similar theories was filed in the Southern District of Florida.

C. Course of Proceedings.

The Third Amended Complaint for Damages filed by Eugene Hasenfus and Sally Hasenfus and upon which the case was tried, purported to state claims for breach of written contract, breach of oral contract, intentional misrepresentation, negligent misrepresentation, and conversion.[1] The Third Amended Complaint for Damages filed by Kasanee Sawyer and upon which the case was tried, purported to state claims for breach of contract, negligence, intentional misrepresentation, negligent misrepresentation, and wrongful death. The total amount of damages sought in both cases was in excess of $10,000,000. The named Defendants in both cases were Richard Secord, Corporate Air Services, a Pennsylvania corporation, Southern Air Transport, Inc., a Florida corporation, and Albert Hakim.[2]

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[1] Notwithstanding numerous pretrial orders, the Plaintiffs were continually changing their various theories of negligence, contract and employment, during the trial. That process continues in this Petition.

[2] Services of process was never obtained upon Defendants, Corporate Air Services and Albert Hakim and these Defendants were dismissed by the District Court.

Richard Secord was not alleged to have personally done anything to harm or damage any of the Petitioners. All of the relief requested against Secord was based upon vicarious liability theories of joint venture or agency.[3]

The thrust of Petitioners' claims was that the airlift operation for which Hasenfus and Sawyer worked was a joint venture comprised of Respondents Southern Air Transport, Inc. and Richard Secord, among possible others. The Petitioners alleged that both Mr. Hasenfus and Mr. Sawyer were recruited to work for the organization by Mr. William Cooper, acting as an agent of the alleged joint venture. At various times during the trial, Petitioners claimed that they were employees. At other times, they disavowed this status.[4]

Petitioners' claims were tried before a jury beginning July 25, 1990 and concluding, after deliberations on August 27, 1990. On August 27, 1990. On August 17, 1990, the court orally announced its Order Granting in Part and Denying in Part the Respondents' Motions for Directed Verdict, and thereafter on September 10, 1990, entered a Supplemental Order Granting in Part and Denying in Part Respondents' Motion for Directed Verdict.[5] As a result of those orders, the claims considered by the jury were Eugene Hasenfus' claim for breach of written contract, Sally Hasenfus' claims for breach of oral contract, intentional misrepresentation and negligent misrepresentation, and Kasanee Sawyer's claim for breach

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[3] In the trial court's July 24, 1990 Order on Motions for Summary Judgment, the Court rejected two other vicarious liability theories, those of civil conspiracy and of alter ego, involving Defendant Corporate Air Services, Ltd.

[4] The Petitioners were not themselves sure of their position, since, if they were employees, they would be barred from suit under the Florida Workers' Compensation Act. The court agreed. Petitioners never decided which position to take.

[5] Motions for Directed Verdicts were filed by both Richard Secord and Southern Air Transport, Inc., as to both sets of Petitioners.

of contract. After deliberations, the jury found that a joint venture existed between the Respondents and that William Cooper (the pilot of the fatal aircraft) was the agent of the joint venture. However, the jury found no breach of any contract, no misrepresentation, and no damages. Judgment was entered for Respondents accordingly.

REASONS FOR DENYING THE WRIT

THE PETITION PRESENTS NO ERROR PROPERLY REVIEWABLE BY THIS COURT.

A. No Basis for the Invocation of this Court's Discretionary Jurisdiction Has Been Made Out.

Petitioners claim as the sole basis for their Petition for review by this Court that the Court of Appeals denied them due process of law and improvidently affirmed the District Court's denial to them of due process of law.

Due process of law as guaranteed by the United States Constitution requires notice and a fair opportunity to be heard. Indeed, as this Court stated in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985):

> An essential principle of due proces is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656 (1950).

These rights were afforded to and fully exercised by Petitioners. They proceeded to trial based upon the multifarious counts and changing theories of their Complaint. A jury of their choice was picked. They presented evidence consistent with applicable law over a three week trial period. The jury was carefully in-

structed and deliberated Petitioners' case over almost five (5) days. Every conceivable procedural safeguard was afforded them. The trial judge indulged every reasonable view of Petitioners favorable to their case, even when they violated much of his Pre-Trial Order.

After Petitioners lost they perfected an appeal. The Court of Appeals had the case for over eighteen (18) months, carefully reviewing over 3000 pages of trial testimony, exhibits, and numerous briefs and oral arguments. The Court of Appeals reviewed the direct verdict *de novo*. See 962 F.2d 1556 at 1559.

Due Process of Law does not require that Petitioners win, which is obviously their understanding of the term. No authority or even basis for the alleged violation of that concept has been advanced by Petitioners. Moreover, Petitioners' new constitutional theory was not even raised in the Court of Appeals.

This court has traditionally not accepted cases except:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. U.S. Sup. Ct. Rule 17, 28 U.S.C.A.

This case is not one which falls in any of the above categories. While couched in "due process" terms, Petitioners simply argue their interpretation of the facts and allege that the Court of Appeals, like the jury and District Court failed to perceive the alleged brilliance of Petitioners' legal and factual arguments. They simply want another hearing by this Court. Traditionally, the Court has declined these invitations. *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531 (1923). *Ross v. Moffitt*, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974).

This Court emphatically stated its position in this area in *General Talking P. Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, *adhered to*, 305 U.S. 124, 59 S.Ct. 116 (1938), *reh'g denied*, 305 U.S. 675, 59 S.Ct. 355 (1939). *General Talking* was a patent case in which the issues of acquiescence and estoppel were based on questions of fact. The Court stated the following:

> There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. v. N.C. Public Service Co.*, 263 U.S. 508. *United States v. Johnston*, 268 U.S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *United States v. Chemical Foundation*, 272 U.S. 1, 14.

Id. at 178.

B. No Basis of Error of Either the Court of Appeals or the District Court Has Been Made Out.

The District Court properly precluded the jury from considering any issue of negligence against Respondents. The Court of Appeals had ample precedent to affirm that decision. See *Stahl v. Metropolitan Dade County*, 438

So.2d 14 (Fla. 3d DCA 1983); *Restatement (Second) of Torts* § 430; *C&B Airways Co. v. Ashurst*, 369 So.2d 631 (Fla. 3d DCA 1979); *Leversen v. Boeing Company*, 510 F.2d 937 (9th Cir. 1975).

In order to prove negligence, Petitioner Sawyer was required to demonstrate that the Respondents owed him a particular duty of care, the breach of which proximately caused damage to him. There was no evidence that any act or omission by the Respondents caused the fatal crash on October 5, 1986. Indeed, the evidence was uncontroverted that the crash was caused by a Sandinista missile and not by the alleged failure to properly equip the aircraft or by any decision on the part of the pilots (Mr. Sawyer and Mr. Cooper) to fly during the day, instead of night, in Southern Nicaragua. See *Gooding v. University Hospital Bldg. Inc.*, 445 So.2d 1015, 1018 (Fla. 1984). Moreover, the trial court could properly have found that Respondent Sawyer knowingly and intentionally assumed the risk of his own death by flying the October 5, 1986 mission. *See, e.g., Ashcraft v. Calder Race Course*, 492 So.2d 1309 (Fla. 1986) [jockey riding horse at race course assumes risks inherent in the sport of horse racing]; *Kuehner v. Greene*, 436 So.2d 78 (Fla. 1983) [participant injured in a karate match]; *Babine v. Gulley's Bronco Shop*, 499 So.2d 176 (Fla. 1st DCA 1986) [plaintiff injured while riding a mechanical bull]; *Black v. District Bd. of Trustees*, 491 So.2d 303 (Fla. 4th DCA 1986) [plaintiff injured in a police academy exercise].

The District Court properly instructed the jury as to Eugene Hasenfus' breach of contract claims. The Petitioners demonstrated no error to the Court of Appeals. *See, e.g. Bornmann v. Great Southwest General Hospital, Inc.*, 453 F.2d 616, 624 (5th Cir. 1971). The trial court properly determined that there was only one written agreement for Mr. Hasenfus' employment, and the testimony indicated that there may have been other oral terms which the parties may have honored. The evidence

of the nature and extent of those terms was not clear but the trial court, in its instructions and in its special verdict interrogatory forms made clear that the jury could find such oral terms. The Jury found none. Accordingly, the District Court committed no harmful or prejudicial error. *See, e.g., Pate v. Seaboard R.R., Inc.*, 819 F.2d 1074 (11th Cir. 1987).

Moreover, the District Court properly ruled and correctly instructed the jury that the Hasenfus employment agreement, if it was found to exist, terminated on October 5, 1986, based upon Mr. Hasenfus' inability to perform. He admitted that he knew capture was a possibility of flying over a combat zone. See *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (Fla. 2d DCA 1965). Finally, there was no evidence of any agreement that Mr. Hasenfus would be paid if he could not perform and there was certainly no basis upon which to find that the Respondents did anything to cause Mr. Hasenfus' inability to perform.

CONCLUSION

For the foregoing reasons, the Petition of Eugene Hasenfus and Kasanee Sawyer should be denied.

Respectfully submitted,

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